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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 721.

ISBRANDTSEN-MOLLER COMPANY, INC.,
Petitioner,

—against—

Motorship "TOLEDO" and WILH. WILHELMSEN, et als., Owners,
Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JAMES W. RYAN,
Counsel for Petitioner.

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II. The facts as found by the Circuit Court of Appeals with respect to the first cause of action in the libel are undisputed. That cause of action was brought in "contract" by petitioner as charterer for breach of respondents' express promise in the charter party that they would deliver a seaworthy ship, and the petition seeks a review of the decision on that first cause of action because of its conflict with the decisions of this Court relied on in the petition.

The fundamental question raised by the petition is the correctness of the Circuit Court of Appeals' decision that a person who has been promised a seaworthy ship is not entitled to one, and must accept and use a seriously unseaworthy ship which has been tendered him, because if he does not do so he will by legal fiction be regarded as a "volunteer" and be precluded by the Federal Courts from recovering any increased expense necessarily incurred in hiring a seaworthy ship from another shipowner as a substitute to perform the contractual service which the original shipowner promised but failed to perform.

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The new rule announced by the Circuit Court of Appeals in this case is of great importance to the public and to American shipping interests because of its radical impairment of the fundamental obligation to deliver a seaworthy ship when an express promise to make such delivery has admittedly been made by written contract. The decision is plainly in conflict with the decisions of this Court in *The Caledonia*, 157 U. S. 124, and other cases relied on in the petition.... 3

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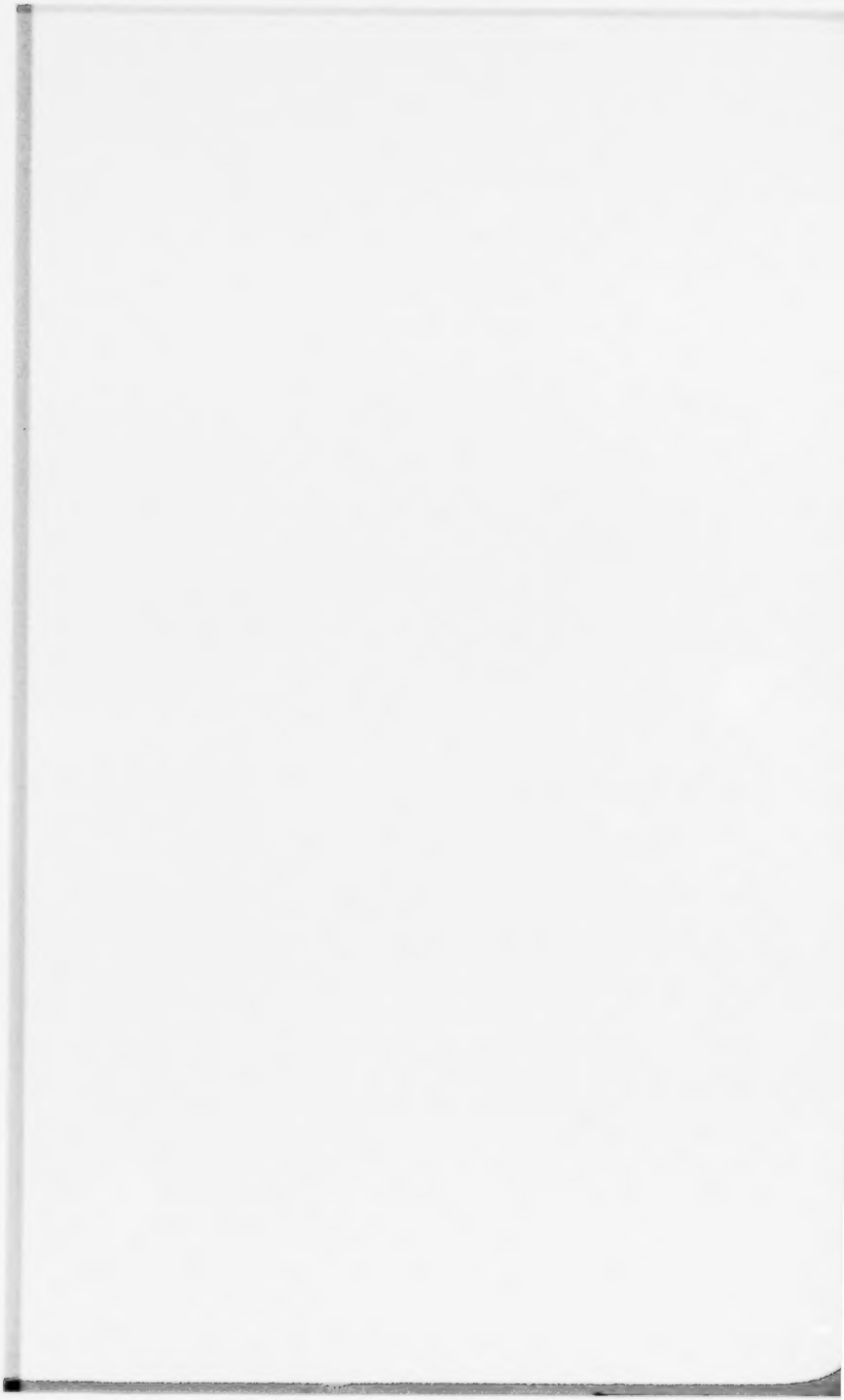

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Opinions Below.

The Toledo, 122 Fed. (2d) 255 (C. C. A. 2); R., p. 481;

The Toledo, 30 F. Suppl. 93 (E. D. N. Y.); R., p. 424.

Jurisdiction.

Jurisdiction is provided by 28 U. S. C., Sec. 347(a).

I.

The petition seeks a review of the decision of the Circuit Court of Appeals with respect to the personal liability of respondents on the first cause of action in the libel based solely on the charter party, and brought by petitioner as charterer for breach of

respondents' express promise to deliver a seaworthy ship. The "further statement of facts" on pages 2 to 6 of respondents' brief is therefore irrelevant and misleading because it relates to the decision of the District Court with respect to the *in rem* liability of the ship on the second cause of action in the libel which was brought by petitioner as bailee and assignee of cargo for "tort and cargo damage" (R., p. 22) and which, as it involved no express promise of seaworthiness, was held to be governed by the Carriage of Goods by Sea Act which exempts a shipowner, in the absence of express promise, from any duty of delivering a seaworthy ship, and limits his duty to the use of due diligence. The "further statement of facts" in respondents' brief also contains statements from that part of the District Court's opinion and grounds of decision which the Circuit Court of Appeals expressly refused to affirm. The "further statement of facts" is therefore wholly inaccurate and misleading, excepting in so far as it quotes charter party clause 15, which will be shown hereinafter to be inapplicable as a measure of damages when the promise to tender a seaworthy ship for loading has been breached. Both Courts below have held that neither the Carriage of Goods by Sea Act nor the petitioner's bills of lading to third parties incorporating that Act has any bearing on the first cause of action in the libel, which is based solely on the charter party entered into directly by respondents with petitioner. (See especially the last paragraph in the opinion of the Circuit Court of Appeals at p. 485 of the Record, and in 122 F. 2d at p. 257. See also the District Court's statements at pp. 191 and 192 of the Record, quoted at p. 24 of the Petition for Certiorari, and the District Court's opinion at R., pp. 429-434 and 426-427, hereinafter quoted.)

II.

The facts of this case as found by the Circuit Court of Appeals, with respect to the first cause of action in the libel, are very simple and beyond dispute: The respondent shipowners promised to deliver a seaworthy ship to petitioner on December 15, 1938. They did not do so, and the petitioner hired a seaworthy ship from another shipowner to perform the service that the respondents had contracted to perform. The excess expense or hire incurred by the petitioner in doing so, over the hire on a monthly basis originally agreed upon with respondents, is sought to be recovered by petitioner in the first cause of action in the libel. On these facts the Circuit Court of Appeals, instead of stopping at that point and awarding petitioner its damages, concluded erroneously as matter of law that petitioner was not entitled to recover this expense, not because it did not incur it (since the uncontradicted evidence shows that it did incur it, R., p. 289), but because, on the expectation that it was going to receive a seaworthy ship from respondents in accordance with the contract, the petitioner had independently entered into contracts with some third persons under which it agreed that it would carry their goods, and as these third persons had not incurred any expense or sustained any damages because petitioner had itself borne the expense of hiring another ship and had thus not breached its contracts with them, therefore [*sic*] petitioner was not entitled to recover its own damages from respondents for the admitted breach of the charter party sued on. Although the Circuit Court of Appeals recognized in the last paragraph of its opinion (R., p. 485) that these independent contracts or petitioner's bills of

lading with third parties and the Carriage of Goods by Sea Act had nothing to do with the case in so far as the first cause of action in the libel based on the charter party is concerned, and that those contracts with third persons were not properly admissible in evidence at all over the objections which petitioner made, it erroneously and inconsistently concluded that the petitioner, on the first cause of action, could not recover from respondents the excess expense of hiring a substitute ship which it had itself incurred, but could recover only an indemnity for supposed damages the third parties might sustain from a breach by petitioner of its contracts with them. On the Circuit Court of Appeals' decision, a person who has been promised a seaworthy ship is not entitled to get it, or on failure to get it, to hire a seaworthy ship from another shipowner at any necessary increased expense to perform the service. If he does so he is a "volunteer". He must use the unseaworthy ship that is offered him. His only chance to recover anything is to go out and find some third persons and promise to deliver them a seaworthy ship, and then not deliver a seaworthy ship or arrange for a seaworthy ship as a substitute, so that he will be himself a defaulter if the shipowner breaches the independent contract with him by delivering him an unseaworthy ship, and thus be enabled as a defaulter to sue for an "indemnity" for damages for which he is liable to the third persons. This new and almost fantastic rule announced by the Circuit Court of Appeals obviously puts a premium on, and encourages, the delivery by shipowners of their ships in unseaworthy condition, notwithstanding their contracts call for delivery in seaworthy condition. The decision of the Circuit Court of Appeals is plainly in conflict with the rule announced by this

Court in *The Caledonia*, 157 U. S. 124, because it exempts an admitted violator of that rule from any liability for damages excepting under arbitrarily-restricted and practically-rare and extraneous circumstances. The Circuit Court of Appeals evidently overlooked the fact that, under the rule in *The Caledonia*, 157 U. S. 124, the petitioner would have been entitled to its damages, *i. e.*, the excess expense sued for of hiring the substitute ship, even if it had not entered into the independent contracts with the third persons. The purpose for which petitioner should use the ship after her delivery by respondents as promised in seaworthy condition, whether or not under contracts that might be entered into between petitioner and third persons, was simply of no concern to the respondents. The respondents' duty under their contract was to deliver to petitioner a seaworthy ship on December 15, 1938, and when they failed to do so they became liable for the excess expense the petitioner incurred in hiring a seaworthy ship from another shipowner as a substitute to perform the respondents' contractual duty. They could not properly escape liability for a breach by insisting that the petitioner accept and use the unseaworthy ship instead of getting a seaworthy one. The Circuit Court of Appeals plainly erred in holding that the respondents could escape liability for their breach of promise of unseaworthiness to petitioner by insisting that their unseaworthy ship be used. Such insistence was unreasonable and was in direct violation by respondents of their contract with petitioner. The rule announced in *The Caledonia*, 157 U. S. 124, is that a shipowner who has promised to deliver a seaworthy ship must deliver a ship which is in fact seaworthy. The decision of the Circuit Court of Appeals in the present case is that although the respondents had promised to deliver to petitioner a

seaworthy ship, the petitioner was required to accept and use an unseaworthy ship, or else be a "volunteer" and not be entitled to recover any expense necessary in getting a seaworthy ship from somebody else as a substitute for the service the respondents had contracted to perform. Chief Justice Taft, then Circuit Judge, writing for the Circuit Court of Appeals for the Sixth Circuit, in *The Oregon*, 55 Fed. 666, 673, said:

> "But it is a general rule that it is the duty of one party to a contract which has been broken by the other to use reasonable diligence to reduce the damages arising from the breach. If, therefore, in cases of freight contracts, the carrier refuses to perform, it is the duty of the shipper, if he can reasonably expect thereby to reduce his loss, to seek other means of transportation, and perform the contract himself."

The Circuit Court of Appeals in the present case announces an exactly opposite rule from that announced by Chief Justice Taft, and still in effect, in the Sixth Circuit. The Sixth Circuit rule was approved and followed in *The Capitaine Faure*, 10 Fed. 2nd at page 969.

III.

Clause 15 of the charter party (the "off-hire" clause), quoted in respondents' brief at page 1, and relied on at pages 10, 11 and 12, was obviously not intended as a measure of the damages in case of a breach by the shipowners by failing to deliver a seaworthy ship. When, as here, a vehicle with driver or crew is hired on a private carrier basis (*i. e.*, to carry a full cargo for a single shipper) at a monthly rate of

hire for a trip to an agreed distant city with "any lawful goods" the hirer chooses to ship himself or to contract as a common carrier to carry for third persons, and the owners represent that the vehicle is in good condition and further make an express promise and a warranty in writing, for an agreed consideration, that the vehicle will be delivered or tendered for loading on an agreed date (December 15, 1938) in good condition, and after the goods are partly loaded it is discovered that the vehicle is in bad condition and has been unfit for the trip since before the contract was entered into, and cannot be made fit until long after the trip would be completed by a good vehicle, and the expense at the time the vehicle's unfitness is discovered of hiring another vehicle which is in good condition to act as a substitute for the trip exceeds the hire originally agreed upon, the measure of damages for which the defaulting vehicle owners are liable is of course this excess hire or expense, and that is what is sued for in the first cause of action in the libel in this case. The Circuit Court of Appeals' decision that on those facts the vehicle owners are liable for no damages at all merely because the hirer, in addition to paying the hire for the substitute vehicle, does not also, under charter party clause 15, have to continue paying hire for the unfit vehicle after its unfitness has resulted in a "breakdown" before the goods are completely loaded, is supported by no decision of any Court in any reported case and is, we respectfully submit, unconscionable and in direct conflict with this Court's decision in *The Caledonia*, 157 U. S. 124. In that case this Court held that such clauses as clauses 15 and 16 in this charter party excepting accidents, breakdowns or other perils do not cover a breakdown or state of complete unfitness resulting, without intervening cause or event, solely from pre-existing unfit-

ness of the vehicle at time of tender for loading. The Circuit Court of Appeals' decision that the *Caledonia* rule applies to clause 16 but not to the similar clause 15 in this charter party is unsound and illogical and deprives the rule in *The Caledonia* (157 U. S. 124) of all practical effect in so far as this well known and widely-used New York Produce Exchange-Government Time Form of charter party expressly promising seaworthiness is concerned. It has been estimated that more than ninety per cent. of the time charter parties executed in this country are executed on this Produce Exchange form. The District Court in its opinion said: "The charter party in question is on the form which has been largely used" (R., p. 428).

The quotations at pages 11 and 12 of respondents' brief from the cases of *The Ask*, 156 Fed. 678; *Aktieselskabet* v. *Hubbard-Zemurray S. S. Co.*, 250 Fed. 67; *Clyde* v. *West India S. S. Co.*, 169 Fed. 275; and *The Bjornefjord*, 271 Fed. 682, are seriously misleading because the Court's attention is not called to the fact that in every one of those cases the vessel was seaworthy on delivery to the charterer and that no question of breach of the warranty of seaworthiness was involved. Those cases decided merely that if a shipowner has complied with his warranty and promise by delivering a seaworthy vessel to the charterer, then under the maintenance clause he need merely use reasonable diligence to maintain her thereafter in seaworthy condition. It is elementary that the duty under a maintenance clause is not a warranty, and is different both in nature and extent from the warranty of seaworthiness applicable at the outset of the service. In the quotations given in respondents' brief the Courts were referring only to the duty under the maintenance clause.

IV.

The Courts below found concurrently that the contract which the respondents entered into was not a contract of common carriage but one of private carriage, *i. e.*, it was a contract for the hire of a vessel with crew, at a monthly rate of hire, for use by a single shipper, the petitioner, in the carriage of a full cargo, the Captain, although appointed by the owners, being at all times (under charterparty clause 8; R., p. 25) "under the orders and directions of the charterers as regards employment or agency", and being required "to sign Bills of Lading for cargo as presented" by charterers. The respondent shipowners therefore had no contractual rights or personal liability with respect to the petitioner's bills of lading or the freight charges which the petitioner might agree on and collect from the third party owners of the various small shipments. The Courts below further found concurrently that the respondents' contract of private carriage was entered into only with petitioner and consisted of the charterparty sued on in the first cause of action in the libel. These findings constitute a direct holding that the respondents were not parties to the contracts of common carriage or bills of lading which the petitioner entered into with the third party cargo owners. Indeed the Circuit Court of Appeals stated that the respondents had taken the position in both Courts below that they were not parties to any contract excepting the private carrier contract with petitioner consisting of the charterparty sued on in the first cause of action. It said (122 F. 2d at pp. 256-257):

> "The appellees attempt to distinguish these cases on the ground taken by the district judge,

> namely, that there the warranty of seaworthiness was made by a common carrier while here it is the promise of a private carrier. * * * The principles of construction discussed in *The Caledonia, supra*, would seem to be equally applicable when the warrantor is a private carrier."

And the District Court in its opinion said (R., pp. 426-427):

> "The charter party was, however, a private contract and not a contract of common carriage, and the relations between the owner and the charterer are not altered if the charterer chooses to put the ship on the berth and offer her to shippers as a common carrier."

The contention at pages 8 and 9 of respondents' brief that the respondents were parties to petitioner's contracts of common carriage or bills of lading with the third party cargo owners, and are consequently entitled to rely on the clauses in them incorporating the Carriage of Goods by Sea Act, the latent defect exception and transshipment clause, quoted extensively as a "further statement of facts" from the District Court's opinion on pages 2 to 6 of respondents' brief, is therefore an attack by respondents on the concurrent findings of the Courts below. The charter party sued on incorporates by special provision (Clause 24, Charter Party; R., p. 25) the Harter Act, which is inconsistent with the Carriage of Goods by Sea Act, and the Harter Act contains no exception of latent defect. Moreover, the pre-existing unseaworthiness at time of loading would under the rule in *The Caledonia*, 157 U. S. 124, preclude reliance on any exception of accident, breakdown, or latent defect. The Circuit Court of Appeals has expressly held that,

with respect to the first cause of action in the libel based on the charter party, the respondents are not entitled to rely on latent defect or accident, and are not entitled to rely on the Carriage of Goods by Sea Act or on any of the clauses in petitioner's common carrier contracts or bills of lading issued to third persons (122 Fed. 2nd at p. 257; R., p. 485). The attack by respondents themselves on the Circuit Court of Appeals' decision confirms the statement in the petition that that decision is unsound and irreconcilable with this Court's decision in *The Caledonia*, 157 U. S. 124, and announces a new rule which is creating confusion in the meaning of hitherto-clear and widely-used commercial contracts containing express promises that vessels when tendered for loading will be in fact seaworthy. The error of the Circuit Court of Appeals consisted in the fact that, after holding that the respondents had contracted as private carriers and that they had breached this contract by failing to deliver to petitioner a seaworthy ship, the Court concluded illogically that the petitioner could not recover the damages or excess expense which the uncontradicted evidence shows it personally sustained as a result of the breach, but could only recover an indemnity consisting of supposed damages sustained by third party cargo owners from supposed breach by petitioner of its independent contracts with those third parties. This conclusion is obviously inconsistent with the Court's holding that the respondents were not parties to petitioner's common carrier contracts with the third persons. In the first cause of action in the libel, the petitioner is seeking in clear language (R., pp. 20 and 1; and Petition, p. 23) the recovery of the damages or excess expense it itself sustained as a result of the breach, and not those sustained by third parties.

The statement on page 9 of respondents' brief that "these rights and obligations are defined in the Carriage of Goods by Sea Act" is incorrect and irrelevant because the Courts below have found concurrently that the Carriage of Goods by Sea Act is inapplicable to the first cause of action in the libel based on the charter party, and indeed the charter party expressly incorporates by clause 24 (R., p. 25, Libellant's Exhibit 15, paragraph 24) the Harter Act which is inconsistent with the Carriage of Goods by Sea Act.

The statement at pages 10 and 11 of respondents' brief that "it was not asserted in the Courts below" by petitioner that "it was the duty of the respondents to provide another ship when this accident occurred", is wholly incorrect. Aside from the numerous times it was asserted orally and in petitioner's briefs in both courts below, the Record shows that the assertion was made by petitioner in Assignments of Error Nos. 2 and 3 (R., p. 458), Nos. 12 and 13 (R., p. 460), No. 15 (R., p. 461), No. 27 (R., p. 464), No. 36 (R., p. 465), No. 37 (R., p. 466), and No. 43 (R., p. 467), and all of those assignments were pressed and argued by petitioner in the Circuit Court of Appeals. Also the Circuit Court of Appeals states in its opinion that "On the 24th the charterer suggested transshipment of the cargo but the captain did not accede to the suggestion" (122 Fed. 2nd at p. 256; R., p. 482). The respondents declined to deliver a substitute seaworthy vessel because of their mistaken belief that, as their counsel argued in both Courts below, they had a "right" under the law to escape any actual financial liability for their breach of contract by insisting that petitioner accept and use an unseaworthy ship notwithstanding it had been expressly promised a seaworthy ship.

V.

The statement at page 8 of respondents' brief that in the case of *Isbrandtsen-Moller Company, Inc.* v. *U. S.*, 300 U. S. 139, "the opinion does not discuss the question of common carriage" is not correct. The only question which was discussed by this Court in that case was the validity of an order issued on November 18, 1935, by "The Secretary of Commerce, purporting to exercise the functions of the United States Shipping Board under Section 21 of the Shipping Act, 1916" and reading, so far as material, as follows:

> "*It appearing further,* That Isbrandtsen-Moller Company, Inc., *is a common carrier by water* in foreign commerce subject to the Shipping Act, 1916;
>
> *It is ordered,* In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and trans-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, * * *" (Record, p. 5, in *Isbrandtsen-Moller Co.* v. *U. S.*, U. S. Supreme Court, Oct. Term, 1936, Docket No. 307).

As the master of the vessel was under charter party clause 8 (R., p. 25) at all times the servant or agent of petitioner as charterer and "under the orders and direction of the Charterers as regards employment or agency" (and see also R., pp. 295-296), neither the master nor the petitioner was an agent of the respond-

ent shipowners in any sense in connection with petitioner's bills of lading or common carrier contracts, and the Courts below have found concurrently that their issuance created no contractual relations between the respondent shipowners and the third party cargo owners with whom the petitioner contracted. The contentions on pages 8 and 9 of respondents' brief are therefore wholly unwarranted.

The statement on page 9 of respondents' brief that "the shipowner can hold the cargo and its owner for freight (if not prepaid)" is wholly incorrect. Under this charter party the respondent shipowners were entitled to nothing but monthly charter hire from the petitioner, and they had no control over or interest in the freight which petitioner and the third party cargo owners agreed upon for the carriage of the goods. The petitioner alone as the charterer was entitled, either directly or through the master as its agent, to hold the cargo and its owner for freight.

The respondents nowhere in their brief mention the conflict of the decision of the Circuit Court of Appeals in this case with the decisions of this Court in *Acme Fast Freight* v. *U. S.*, 309 U. S. 638, and *U. S.* v. *Trucking Co.*, 310 U. S. 344, relied on as grounds for certiorari at pages 3, 4 and 29 of the Petition.

The contention on pages 12 and 13 of respondents' brief, in support of the part of the District Court's opinion which the Circuit Court of Appeals refused to affirm, is unsound. The fact is that the exceptions clause in the charterparty in the present case is in all substantial respects identical with that in the *Caledonia* case (157 U. S. at p. 127). The exceptions clause in the *Caledonia* case recited the various perils by name, including loss or damage from steam boilers

and machinery or defects therein, accidents, and others, and concluded with the word "excepted". The exceptions clause in the present case (Clause 16, Charterparty, Libellant's Exhibit 15, R., fol. 73) recites the various perils by name, including dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation, and concludes with the words "throughout this charterparty, always mutually excepted". The additional words in the clause in the present charterparty are words not of extension, but of restriction. The perils in the clause in the *Caledonia* case were excepted without limitation. In the present case they are only excepted "throughout this charterparty". It is, therefore, plain that the perils excepted in the present charterparty are only perils or intervening third causes originating or encountered either after the charterparty was entered into or after the "Toledo" should have been delivered by respondents to petitioner in seaworthy condition for service under the charterparty. On the concurrent findings of the Courts below no peril or intervening third cause originated or was encountered by the "Toledo" after this charterparty was entered into or after she was delivered to the petitioner for service under the charterparty, and everything happening to her thereafter resulted inevitably from an already unseaworthy condition.

In *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312, this Court held that in the absence of a clause in the shipowner's contract giving the shipowner the benefit of a shipper's contract of indemnity obtained from third persons, the shipowner is not entitled to any benefit or indemnity the shipper may be entitled to from the third persons. The respondent shipowners' contract of charter party with petitioner in the present case contains no such clause giving respondents the benefit

of any indemnity which petitioner may be entitled to under any contracts entered into between petitioner and third persons or cargo owners. The decision of this Court in the *Phoenix Ins. Co.* case is, therefore, directly in conflict with the decision of the Circuit Court of Appeals in the present case that the respondent shipowners are entitled to the benefit of petitioner's contracts with third persons by limiting petitioner's recovery merely to such amount as the third party cargo owners may have agreed with petitioner to assume.

In *The City of Norwich*, 118 U. S. 468, this Court held that the fact that one of the parties had entered into an indemnity contract with third persons did not entitle the other party to use the terms or benefits of that indemnity contract as a means of increasing or reducing the measure of damages otherwise applicable between the parties for a breach of duty by one to the other. The Circuit Court of Appeals in the present case has held that the fact that the petitioner entered into "indemnity" contracts with third party cargo owners changes the otherwise applicable measure of petitioner's damages for respondents' breach of duty under the charter party by restricting petitioner's recovery from respondents to "a claim for indemnity" (122 F. 2d at p. 257) for "the damages which the cargo owner would have against it" (122 F. 2d at p. 257) under the indemnity contract between petitioner and the third party cargo owners.

The decision of the Circuit Court of Appeals in this case is therefore also in conflict with those decisions of this Court.

Respectfully submitted,

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